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Intelligence Secrecy and Security in a Free Society

William E. Colby

Knowledge is power, giving strength to one who possesses it, weakening him deprived of it. On this concept secret intelligence arose over the centuries, justified by the sovereign state system in which a nation's independence and welfare depended on its strength.

But in recent years a new concept of national strength has arisen. The active political involvement of a nation's population was seen necessary to national survival and progress. This development led to the necessity of informing and even "indoctrinating" the nation in its government's policies in order to inspire the population to sacrifice for the nation's goals. As universal suffrage, education, and communications improved and spread, so did the need to inform the people of the challenges their nation faced.

In nations with authoritarian discipline or ones amenable to direction by an "establishment," the reserve power of the secret was accepted, and preserved. But free societies and their free press strove for the revelation of the secret, creating a contest between how much should be revealed to produce an informed public and how much should be withheld in the nation's interest. In times of great challenge, national allegiance prevailed over curiosity, and secrets were respected. In other periods, the public and the press were less acquiescent, and exposures proliferated.

In the United States, Vietnam and Watergate marked a turning point in this relationship. The media penetrated the deepest recesses of government. These revelations convinced many citizens that the leadership was manipulating access to fact in order to mislead the public and that it was violating the trust which justified any claim to secrecy. Sensational charges of intelligence abuses then cast doubt on the propriety of any secrets, as it seemed that wrongdoing could be concealed behind even the most justifiable of secrets.

Is secrecy incompatible with a free society? Should we forswear secret intelligence in order to protect our freedoms, and look to a resulting moral strength to save us from threats from the world around us? Or must we accept limits on our freedoms in order to preserve our community in a dangerous world?

We are not faced with such cataclysmic choices. Both exposure and secrecy are essential to a truly free society. But we must achieve a new theory of secrecy appropriate to our new society of instant communication, universal education, and mass opinion.

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The Legitimacy of Secrecy

Secrets are necessary to a free society. A fundamental of our democracy operates in secret—the ballot box, and its secrecy is essential to the workings of our democratic system. A number of other secrets are protected by our laws and legal procedures—the attorney-client and doctor-patient relationship, crop statistics compiled by the Agriculture Department which might upset the free market if prematurely revealed, and income tax returns which may be less forthcoming unless protected from improper exposure to public curiosity.

These and other secrets are accepted and protected in order to make our democracy work. We even see a trend toward greater concern for personal secrecy in the growth of privacy legislation, designed to protect the citizen from exposure and control by the improvements in information acquisition and processing in the modern world. Also, many of our journalists look for more specific, legal recognition of the importance of protecting their sources who do not wish to be disclosed.

If "national security" is discredited as a catch-all justification for total secrecy, a new theory of legitimate secrecy must replace it. The "troopship sailing order" still anachronistically cited by the courts as the justifiable secret must be translated into its modern counterpart. But if the dispatch of troops and their continued employment depends on Congressional and public acquiescence under the War Powers Act, then the rationale for their use must be exposed to our public, and not hidden behind statements claiming to protect intelligence sources or to avoid national diplomatic embarrassment.

One of the best statements of the dilemma of secrecy in our free society was made by President Ford when he said that he would be glad to share our secrets with 214,000,000 Americans if no further exposure would occur. In his statement, he reflected the positive need to inform our citizens of their government's activities but noted also the fact that the world reads our press avidly. Other Presidents have experienced this paradox of secrecy and the free society. President Eisenhower took full responsibility for the 1960 U-2 mission that was shot down over the Soviet Union; he intended to demonstrate that he was fully carrying out his Constitutional responsibilities to direct the executive branch. Yet, as former Soviet Premier Khrushchev explained in his memoirs, Eisenhower's acknowledgment of responsibility raised an intelligence problem to a chief-of-state challenge, and led Khrushchev to cancel the Paris Summit in reprisal. The requirements of public responsibility in our free society conflicted with the mores of international life, which called for secrecy or at least a disclaimer of intelligence problems. President

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Kennedy followed Eisenhower's path by accepting full responsibility for the "covert" Bay of Pigs operation in 1961 despite the tenuous prior arrangements made for its "plausible denial."

But if American political life operates on a new theory of secrecy, its legal and bureaucratic directives do not reflect it. The language of such directives clings to the outmoded concepts of sovereign secrecy. Valves through which the pressures of the real world can be relieved exist in backgrounders by "senior American officials," in "whistle blowers," and in congressional exposure—all of which contradict the concept of "national security" on which the structure of secrecy is built. Two key documents in recent years have attempted to update basic concepts of secrecy: President Nixon's Executive Order 11652 of March 1972, and the Freedom of Information Act amendments of November 1974. Each has made a step toward a new structure of secrecy, but each contains major weaknesses which will limit its effect.

The Executive Order starts with a call for greater openness in American government, but continues to recognize the propriety of secrecy "in the interest of the national defense or foreign relations of the United States." It sets out three degrees of classification—Top Secret, Secret, and Confidential. The Order includes several innovations, however. It attempts to impose individual responsibility for the decision that a matter should be secret, requiring that individuals be formally authorized to classify. It sets out a procedure for declassification, either by the passage of specific time limits or by review following a request. And it establishes a review committee to monitor the system and to receive and act on complaints.

In fact, however, the Order made little change in the traditional climate and processes of secrecy in intelligence. Instead, it spawned a large bureaucratic exercise of stamping each of thousands of pieces of paper with a notation that it fell within one of the provisions whereby automatic declassification could be deferred. The quantitative requirements of bureaucratic life made it impossible to apply the Order's call for a careful and independent judgment on each piece of paper. Thus the process became mechanical, was handled in large part by the secretarial staff, and concentrated on avoiding chance exposure by error at the cost of extra classification. It did however lead to the release of a number of World War II documents and speeded access to other historical source material in some small degree.

The Freedom of Information Act amendments of November 1974 had a more substantial effect, although their major impact has been on the release of historical documents rather than the revelation of current ones. The amendments'

major feature gives any citizen the ability to secure documents that he can reasonably describe unless they fall within one of several exceptions; if the government agency and the citizen disagree a court is to decide.

This last provision was passed over President Ford's veto; he maintained that a court is not the appropriate body to determine whether documents need protection in the interest of the national defense or foreign policy of the United States. He did concede that a court could properly review whether the government classification officer had acted reasonably. The President may have nevertheless won his point. Congressman Morehead, House manager and conferee for the Act, stated before the vote overriding the veto that the President's procedure would still be "exactly the way the courts would conduct their proceedings."¹

The Act and its amendments have had a substantial effect in opening to the public view many documents which might never have seen the light of day without it. Its impact was increased by the congressional intelligence investigations of 1975, stimulating many requests for material which had been adverted to in official reports or leaks.

Exciting as some of the revelations under these new rules have been, they have not really solved the dilemma of secrecy in a free society. The revelations may even have been harmful, since it was the sensational quality surrounding past events or activities that captured public attention. The public thus formed an outdated image of a government agency which had already changed its rules and procedures to forswear the activities revealed. The purpose of free information is to encourage debate about our current programs and policies, not to support mere exercises in historical revisionism.

A New Theory of Secrecy

A new theory of secrecy can begin by approaching the question from its other side, defining what needs to be exposed rather than what needs to be kept secret. It is too easy to say that "everything" should be known unless there is a good reason for its secrecy, as spelled out by the "exemptions" of allowable secrets in the 1972 Executive Order and under the Freedom of Information Act. Bureaucratic attention then focuses on the exemptions.

Instead, a new theory of secrecy can start with a reversal of the old rule of discipline within the intelligence agencies—the "need to know." This rule provided that secret information would be made available to those who needed it

1. *Congressional Record* Nov. 20, 1974, P.H-10865.

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for their duties—and only to them. In the American constitutional system and with modern communications, this rule calls for commitments and procedures to make information available to all participants in American decision making so that they can fully play their roles. The executive branch thus must *inform* the Congress and the public. Intelligence must serve as well as abide by the Constitution. In most cases, "need to know" would also provide the basis for a sharp delineation between the politically significant information needed for public decision making and the technical detail not essential to such decisions. The latter generally constitutes the data which would be of value to our nation's adversaries.

The Angolan Experience

The recent American experience in Angola provides an example of the need for this new approach. Classified intelligence provided warnings as early as late 1974 that Soviet arms were being provided to the Popular Movement for the Liberation of Angola (MPLA). The Soviet intent was clearly to strengthen this Movement, not in its liberation efforts, but rather against its rivals for control of the country in a post-independence struggle. Liberation was no longer a goal once the Portuguese had announced their intent to free Angola by November 11, 1975. This intelligence was viewed by the executive branch officials privy to it as ominous, in the light of the Soviet Union's growing position in Somalia, the Indian Ocean, and Guinea, and against the backdrop of its mid-1960s aborted attempt to establish a position in the Belgian Congo, now Zaire. The black nations bordering Angola were also concerned about the Soviet aid and suspected it as bearing the seeds of radical challenge to their security. It also raised the likelihood of violence in black-white relations in Southern Africa, to the detriment of hopes that these relations might be improved through negotiations. But the intelligence reports and assessments remained within classified channels and were not shared with the public.

In early 1975, the Forty Committee of the National Security Council approved a secret program of political, non-military assistance for the National Front for the Liberation of Angola (NFLA). For many years the Front had operated against the Portuguese from neighboring Zaire. In compliance with a little noticed amendment to the Foreign Assistance Act passed in December 1974, this assistance was found by President Ford to be important to the national security of the United States and was reported in closed sessions to the Foreign Relations, Armed Services, and Appropriations Committees of the Senate and the House, in which no particular objections were raised.

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By June of 1975, the Soviet assistance was proving effective. Several efforts by African nations failed to arrange a coalition or other compromise among the three groups vying for post-liberation power. The MPLA used the Soviet military aid to push the National Front and the National Union for the Independence of Angola (UNITA) towards their traditional tribal sectors. It was clear that independence in November would find the MPLA in full control of Angola unless the resistance of its two rival groups could be strengthened.

The National Security Council thus approved additional assistance, including military hardware, for these two groups. Again, in conformance with the 1974 law, I briefed the six committees of the Congress, plus the two select committees investigating intelligence, in secret sessions. In response to a request to summarize one committee's reaction to the briefing, I said that I thought the members of the committee were not very much "for it" nor very much "agin it." Under the existing law, I said this left the executive branch free to proceed, which the committee accepted. Only two or three members noted objections to the activity.

American assistance proved effective. Within two months, the tide of the struggle had reversed. The two opposing groups not only cleared their own areas but began to threaten the MPLA's base in Luanda. The Soviets responded with an escalated large-scale airlift of modern weaponry, including tanks, artillery, and rockets, and the rapid movement of some 12,000 Cuban military personnel to join directly in the battle. The tide reversed again. In October calls were made for additional military equipment and support for the National Front and UNITA. UNITA also, in desperation, accepted assistance from South Africa, thus causing its immediate rejection by a number of black African nations.

The National Security Council supported the increase in assistance, hoping that frustration of the Communist drive could lead to a compromise settlement through the good offices of the nations of black Africa. But available funds had been exhausted, and positive congressional approval was needed to obtain additional funds. While the request was being discussed with the various committees, the secret American assistance in Angola leaked into the press.

Three elements combined to produce a storm of protest. The fall of Vietnam had solidified public opinion against what appeared to be faraway involvement. The intelligence investigations and their sensational revelations produced distrust of secret activity. And there was no preparation of the public for the disclosure of American assistance through a clearly defined over-all United States policy toward Angola, within which secret assistance might have been understood. That America's assistance went to anti-Portuguese nationalists struggling against a faction favored by the then left-leaning Portuguese colonial authorities, that our as-

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sistance came after consultation with neighboring black nations, and that it in no way contemplated Vietnam-style American military involvement, were facts that were lost in the attack against a "covert" policy and program.

The Congress voted against further aid to Angola, and within a few weeks the MPLA's victory over its opponents, with the aid of Soviet airlifted arms and Cuban soldiers, was complete. America's assistance to black nationalist groups resisting Soviet and Cuban supported factions stopped.

There are arguments for and against the Angolan experience. But I describe it here for another purpose, to show that even if American aid was assumed to have been desirable, those Americans who "needed to know" about it, did not. Since much of the intelligence about Soviet and Cuban involvement was initially classified, it was shared only with decision makers in the Executive Branch and with the congressional committees that were briefed in compliance with the 1974 law. Since many of the diplomatic discussions with black African nations were in confidence, their concern over Soviet and Cuban support of the extremist MPLA was kept within Executive Branch policy councils. The assistance given to the National Front and the National Union was not contained within a policy envelope that was debated and agreed upon publicly. Yet the congressional vote revealed clearly that under the Constitution the public had a "need to know" the facts and assessments about Southern Africa if it was to support an American decision to limit the extension of Soviet and Cuban power there.

"Need to Know" and Secrets

"Need to know" can also solve some of the subsidiary questions about how much information should be disseminated. The identity of a secret intermediary whose role, livelihood and even life might be endangered if his identity were exposed need only be known to those actually dealing with him and the staffs who must warrant his reliability by their independent investigations. "Need to know" may require that the substance of the information he reports be made available to those who must use it to make American policy decisions, but none of these policy levels need to know his actual identity. His professional intelligence contacts could thus produce his information in a form appropriate for broad circulation without divulging his identity.

This new concept will place unaccustomed responsibilities on intelligence officers, who have justified the restricted and comfortable circulation of their substantive intelligence reports by the need to protect their sources. With the obligation to disseminate the intelligence equal to the responsibility of acquiring it,

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new forms of reports and finished assessments must be developed in which the sources do not appear but the information does. In some such cases the source can be generically described when he or it cannot be pinpointed; in others the journalist's convention of a "reliable source" must be used; in others the information or assessment must merely be stated on the intelligence officer's or service's own authority. Close collaboration between collector and analyst would be required because the analyst must have a clear understanding of the reliability of the source. And the reputation of the final product of the service will be built upon its cumulative value and accuracy over time, not by the fascination of an inside look.

The line between dissemination and secrecy is somewhat more difficult to draw in the world of diplomacy, but again the "need to know" approach can provide a guide better than those applied today. The suggestion in the 1920s of "open covenants openly arrived at" proved unrealistic in a world in which national pride rejected any public compromise of initial bargaining positions in diplomatic negotiations. But we have found equal loss of credibility and popular acceptance from attempts to manipulate public opinion and support through selective release of positive news by the government, especially when matched by exposure of negative material through leaks by unhappy line officers.

With recognition that the American public "needs to know" the essential structure of negotiations or other foreign policy problems, these can be briefed in broad terms without exposing the confidences which are essential to the process. The successful example of the statements by "a senior American official" travelling on Secretary Kissinger's aircraft during his Middle East negotiations demonstrates this approach best. Formalized, the approach could lead to a security system appropriate to diplomacy, marking position papers as "protected while under negotiation," identifying confidences provided by foreign friends as not to be associated with them, and limiting the circulation of criticism of foreigners and foreign situations which would cause insult or retribution if revealed. It would certainly be an improvement over current procedures requiring such real justifications to be phrased in the terms of the 1972 Executive Order (i.e., exposure would cause "exceptionally grave," "serious," or mere "damage" to the "national security"). Despite the flood of leaks and other exposures of such material over the past several years, it has been difficult to specify such "damage to the national security" in any but general terms.

In the military field, the approach is just as applicable, and the distinctions reasonably easy to draw. In fact, the Defense Department and the military services to a large degree appreciate the public's and the Congress's "need to know"

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and are carrying on an extensive program of public information and Congressional briefings, including the content of many documents which still bear secrecy markings threatening doom to any exposé.

This new approach to secrecy is subject to the challenge that it might result in the selective exposure of *favorable* information only, on the thesis that the Congress or the public needs to be "convinced" of a preferred solution rather than to "know" the full spectrum of information and assessment about a problem. But attempts to use this approach only to that limited degree would fall of their own weight. The critic within the system would press the public's need to know his side of the case with its supporting information and rationale. In very little time the record would clearly reveal a bias in the matters exposed, or error in the assessments or data distributed. Any failure of integrity in applying the system would be more identifiable than the present process of throwing the blanket of "national security" over a host of matters which reserve confidential handling but whose exposure certainly would not collapse the Capitol.

Another dilemma has complicated our security system, that of including in it material which may be generally known but which should not be asserted or admitted officially. As a centuries-old rule of international relations the spy has been disowned when caught. In more recent years, this rule has been both violated and respected. President Eisenhower, we recall, assumed responsibility for the U-2. On the other hand, after many detailed journalistic accounts of intelligence operations obtained from leaks, the Executive Branch has refused comment. The first case caused, while the second cases avoided, international confrontations.

An executive branch claim that official admission of such an event would cause "damage to national security" is usually rejected by Congress and the press who point to wide public knowledge of it. With a general acceptance of the public's "need to know," release of such information can be made by a congressional committee or the press without attribution while the executive officially remains silent. This in fact took place with respect to several matters reviewed by the select committees investigating intelligence—in a typical, pragmatic, American constitutional solution to a theoretical dilemma.

Who is to Decide

A problem inherent in any system of secrecy arises over who is to decide what is to remain secret. The present structure based on the 1972 Executive Order requires the individual appointment of classification officers and gives them the concomitant authority to declassify. As mentioned earlier, it calls for automatic

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declassification at certain time limits unless the material is exempted, and in such cases provides that the validity of the exemption may be reviewed. The decision in all cases, however, essentially remains with the originating department or agency. The 1974 amendments to the Freedom of Information Act provided an additional locus of decision in court review of the agency's decision that material be withheld. The major unsettled question, though, revolves around the Congress's role and authority in this field.

The present classification system rests on executive branch authority, in Executive Order 11652. Congress has recognized the legitimacy of such a category of information in many statutes, such as the Freedom of Information Act with its exemption of matters "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy." At the same time, the Congress again in many statutes such as the Freedom of Information Act, has clearly stated that no authority is granted to withhold information from the Congress. With the exception of the sharply limited but still somewhat imprecise area of so-called "executive privilege," the Congress asserts full access to executive department or agency information as an aspect of its constitutionally-provided legislating and appropriating functions.

Sharing secret information with Congress removes the information from executive branch administrative authority, however, and subjects it to possible exposure on the floor, since members are protected by the "speech and debate" clause of the Constitution. In recent times this regrettably has increased its vulnerability to being leaked.² A series of confrontations has thus occurred over whether secret information should be shared with a Congress asserting a right to reveal it. Preliminary steps were taken recently to cite Secretary Kissinger and myself for contempt of Congress over this issue. The resolution of those cases, and of many more, eventually occurred through mutual compromise, leaving the ultimate constitutional question unanswered—in the best tradition of the separation of powers.

It is probably best not to decide between the respective and contradictory claims of full access and authority made by each branch, and instead resolve conflicts on a case by case basis. The alternative could be an unrealistic "victory" by one branch over the other or a complex and unworkable over-all arrangement leading to interminable bickering about its interpretation. However, commitment on both sides to the Congress's and the public's "need to know" with recog-

2. The Committee of Secret Correspondence of the Continental Congress in 1776 first identified this problem when it refused to pass certain secret information to the Congress as it found "by fatal experience, that the Congress consists of too many members to keep secrets."

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nition that some categories of detail are not "needed," would reduce the occasions of conflict.

Protection of Secrecy

Any review of the status of secrecy in America must also look at the protection of secrecy. A recent study summarizes its status starkly by saying, "The basic espionage statutes are totally inadequate."³ The flood of secrets which has marked the past two years has called into question the nation's ability to keep any secrets, has worried many nations dependent on America's support, and has provided our foreign adversaries with a cornucopia of specific material to use against us.

A principal failing of the present secrecy system is that essentially it protects only against foreign espionage. In fact, in today's world, information published becomes available to adversary and ally, as well as citizen, and the intelligence profession in many countries now includes many students and researchers of our open literature. Resultant government attempts to bar publication through injunction have run into the Supreme Court's position that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."⁴ In one case involving a former CIA employee threatening to reveal secrets learned during his employment, an agreement that he made when he began work to keep those secrets was enforced by injunction. However, the government's success in that case depended more on contract law and its fortuitous discovery of the employee's publishing plans before he implemented them than on secrecy law, and punishment after the fact might have been considerably more difficult.

On various occasions, the executive branch has raised with Congress the need for clear legal punishment for the unauthorized publication of the nation's defense and foreign policy secrets. Congress has consistently seen broad dangers to free speech, the free press and executive responsibility in such proposals. The broad restrictions of the British Official Secrets Act were seen as incompatible with the protections of the Bill of Rights. The price of protection of the executive's secrets was seen as too high and the exposure of some of the nation's secrets was accepted as a reasonable cost of a free society. In many cases, such exposure was viewed as a positive contribution to the revelation and correction of governmental wrongdoing.

3. Harold Edgar and Benno C. Schmidt, Jr., *The Basic Espionage Statutes and Publication of Defense Information*, 73 *Columbia Law Review* 929, 1076 (1973).

4. *Nebraska Press Assn. v. Stuart*, June 30, 1976.

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In the past year, however, two developments make another look at this problem mandatory. First, the flow of legitimate secrets has increased manifold, with adverse effects on the government's ability to act and to maintain a reasonable discipline among its employees. Serious Americans, including some in the press, are wondering aloud if reasonable limits have not been passed on undisciplined exposure.

The second development is President Ford's recommendation of legislation to punish the unauthorized disclosure of intelligence sources and methods. Following considerable study and debate within the executive branch, he submitted a sharply limited bill. The bill would apply only to those in authorized possession of such secrets and would impose penalties on them for any unauthorized disclosure of the secrets that they had promised to keep. However, it would shield the recipient of the information—whether a journalist or any other citizen—from penalty. It also provides that a court *in camera* can review whether the revealed information was lawfully classified. This provides judicial review of the executive decision that the matter be held secret and protects against capricious overclassification or cover-up of wrongdoing. The modified bill would thus give full recognition to the essentials of our free society and would protect the intelligence sources necessary to its continued existence in a world which has not yet become safe for democracy.

One objection raised against the bill can be easily solved. Journalists have been concerned that they might be subpoenaed as witnesses and asked to divulge sources of leaked information, even though they themselves would be immune from prosecution. A "shield law" provision could be added that any user of the exposed information under the Bill of Rights could not be compelled to testify against his source. This could still permit punishment of the violation based on other evidence.

Within the framework of a new commitment by the executive to the Congress's and the public's "need to know," this better protection of what they do not need to know should gain the Congressional votes and the public support for passage into law. This policy of "need to know" would constitute a new and uniquely American theory of intelligence secrecy which conforms to American values. Indeed, the practice of such a theory could lead to a freer exchange with other nations and peoples of what they too "need to know" about the difficult economic, sociological, political and security problems of the world in the 1980s and 1990s. These then might be negotiated and resolved by cooperation based on knowledge obtained through intelligence.